IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

WP(C).No. 27996 of 2007(G)

PETITIONER:

VIJAYA BANK,CHANGANACHERRY BRANCH,
REPRESENTED BY ITS BRANCH MANAGER.

BY ADV. SRI.K.ANAND (A.201)
SMT.LATHA KRISHNAN

RESPONDENTS:

STATE OF KERALA REPRESENTED BY
PUBLIC POSECUTOR,HIGH COURT OF KERALA

BY GOVERNMENT PLEADER SRI. P.N. SANTHOSH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1- TRUE COPY OF the JUDGMENT OF the HIGH COURT OF BOMBAY IN CRL.WRIT PETITION NO.2767/06

EXT.P2- TRUE COPY OF JUDGMENT DATED 15.6.07 IN W.A.1359/07

EXT.P3- TRUE COPY OF the APPLICATION SUBMITTED BY THE PETITIONER BEFORE THE LEARNED CHIEF JUDICIAL MAGISTRATE, KOTTAYAM

EXT.P4- TRUE COPY OF the PROCEEDOINGS OF the LEARNED CHIEF JUDICIAL MAGISTRATE, KOTTAYAM.

(TRUE COPY)

P.A TO JUDGE

ANTONY DOMINIC, J

W.P.(C). 27996/2007

Dated this the 29th day of November, 2007

JUDGMENT

The reliefs sought for in this writ petition are to declare that no notice or hearing to the borrower is contemplated under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as the 'Act' for short) and to direct Chief Judicial Magistrate, Kottayam, to act in pursuance to Ext.P3.

2. Petitioner is a nationalized Bank. Proceedings were initiated against the mortgagor of certain properties and after complying with the procedures that are laid down in the Act, Ext.P3 application was filed by the Bank for an order under Section 14 of the said Act. By this application, the Bank prayed for an order from the Chief Judicial Magistrate, Kottayam, to take possession or cause to take possession of the properties and forward to the secured creditor, the petitioner, Bank. Initially in Ext.P3, though the borrowers were also impleaded it is now

revealed that on an application filed by the petitioner itself, they were deleted from the party array. The Bank complains that although there is no question of issuance of notice to the borrowers or adjudication involved in an application under Section 14 of the Act, still the Court below has not passed orders on Ext.P3 and it is in these circumstances, this writ petition has been filed with the prayers mentioned above.

3. Section 14 of the Act provides that when the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the aforesaid purpose, make a request, in writing, to the the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or bound, to take possession thereof.

4. Section further provides that once such a request is made by the secured creditor, the Magistrate concerned shall take possession of such asset and forward the same to the secured creditor.

5. Question raised in this writ petition is whether while considering an application made by a secured creditor under Section 14 of the Act whether the Court is obliged to issue notice to the borrower. As already noticed, the Section describes the application to be filed by the secured creditor as a request and the Act provides that once such a request is made, the Magistrate concerned shall take possession of such assets and forward such assets to the secured creditor. Reading of the terms of the Act would show that while considering such a request no adjudication is expected from a Magistrate. On the other hand once an application is filed by the secured creditor, the Magistrate is mandatorily obliged to act upon the same and take possession of the secured asset and forward such asset

to the secured creditor. The Section does not leave any part of the duties of the Magistrate, to his discretion.

6. Issue as to whether the borrower is entitled to be issued a notice has been considered by the Bombay High Court in the judgment in Criminal Writ Petition No.2767/2006 wherein after surveying various provisions of the Act and also referring to the precedents, the High court has held as follows:

> In our opinion, to secure its object the NPA Act has by necessary implication ruled out giving hearing either to the borrower or third parties till the application is filed under Section 17. As observed by the Supreme Court ion Transcore' s case Section 6 of the NPA Act inter alia states that the bank or financial institution may, if it considers appropriate give a notice of acquisition of financial assets by any securitisation company or reconstruction company to the borrower and to any other concerned person but they may or may not give notice to the

borrower regarding acquisition of financial assets the reason being that assets are transferable over might. Section 13(2) contemplates a notice to the borrower calling upon him to discharge his liabilities. Section 13(3A) requires that secured creditor to communicate to the borrower reasons for not accepting his representation or objection and proviso thereto states that such communication shall not confer right on the borrower to make an application under Section 17 at that stage. Section 14 with which we are concerned here does not contemplate any notice to the borrower or a third party. It is only Section 17 which states that any person including borrower can make an application to DRT being aggrieved by any measure taken under Section 13(4). Explanation to Section 17 clarifies that reasons communicated to a borrower at the stage of communication will not confer on the person including borrower any right to make an application to DRT under Section 17(1). Section 18 again confers right on any person aggrieved by an order of DRT under Section 17 to file an appeal before the Appellate Tribunal against

the said order. Therefore, third party was in the mind of the legislature when it enacted the NPA Act. Where ever necessary reference is made to third party. Nothing prevented the legislature from specifically making a provision in Section 14 for notice to the borrower or third party. It purposely did not make provision for notice or hearing being given to the borrower or third party at the stage of Section 14. Looking to the scheme of the NPA Act, we are of the opinion that notice or hearing to the borrower or third party is excluded at the stage of Section 14 by necessary implication.

On behalf of the respondents, it was urged that the CMM/DM acting under Section 14 is performing a ministerial function and hence it is not necessary to give a hearing to the affected parties as he cannot determine the rights of the parties. The petitioners countered this submission by stating that it is a judicial or quasi judicial act and hence hearing is a must. It is not necessary for us to go into all these arguments in view of our conclusion that Section 14 of the NPA Act by necessary

> implication rules out notice or hearing to the borrower or third party and looking to the object of the NPA Act, such a conclusion is inevitable and justified.

7. This issue came up for consideration before a Division Bench of this Court in W.A.1359/2007, where this Court has also taken the same view as reflected in paragraphs 7 and 8 of the judgment, which is extracted below for reference.

> It is an admitted fact that the property in dispute has been mortgaged with the 2nd respondent bank. In order to realise the amount from the defaulter, the bank has pressed into service the provisions of the Act. Since possession was not handed over to the bank, the bank has gone before the Chief Judicial Magistrate as contemplated under the Act itself. The learned Chief Judicial Magistrate, after considering the plan raised by the appellants/petitioners, has come to the conclusion that no notice was required to be issued to the petitioners

> before passing any orders, on the request made by the 2nd respondent bank.
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> In our opinion, the reasoning and conclusion of the learned Chief Judicial Magistrate cannot be stated to be arbitrary or in violation of the statutory provisions and also contrary to the observations made by the Apex Court in **Mardia Chemicals Ltd, v. Union of India and others.**

8. The above finding of this Court is consistent with the view taken by the Bombay High Court. It is thus clear that the uniform view taken taken by the Courts is that in an application under Section 14 of the Act, the concerned Magistrate is not required to issue notice to the borrower and the borrower cannot insist that he should be heard in the process.

9. In view of the above, I do not find any ground to decline the relief sought for in this writ petition. Accordingly, I direct that the Chief Judicial Magistrate, Kottayam, shall take up and deal with Ext.P3 application

filed by the petitioner, Bank, as expeditiously as possible of the production of a copy of this judgment.

Writ petition is disposed of as above.

ANTONY DOMINIC
Judge

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